IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AMGUARD INSURANCE COMPANY A/S/O RICHARD E. CLEVELAND,	)	
Plaintiff,	)	
v.	)	C.A. No. N22C-08-428 SKR
DONEGAL MUTUAL INSURANCE COMPANY,	)	
Defendant.	)	

MEMORANDUM ORDER

This 31st day of May, 2023, upon consideration of the defendant, Donegal Mutual Insurance Company's ("Defendant" or "Donegal") Motion to Dismiss,[1] briefing from the parties, and the record in this case, it appears to the Court that:

FACTUAL AND PROCEDURAL BACKGROUND

1. This matter arises from an insurance dispute following a motor vehicle collision in which an employee, covered under both workers' compensation and personal injury protection ("PIP") insurance, suffered injuries.

2. On August 23, 2022, AmGuard Insurance Company ("Plaintiff" or "AmGuard"), a worker's compensation insurer, brought suit against Donegal, the

[1] Def.'s Mot. to Dismiss (Trans. ID. 68622505) ("Def.'s Mot.").

PIP insurer, for subrogation of workers' compensation benefits paid to the injured employee, Richard Cleveland.[2]

3. On December 15, 2022, Defendant filed a Motion to Dismiss pursuant to Delaware Superior Court Civil Rule 12(b)(6). Defendant asserts that AmGuard's claim for subrogation contradicts the explicit language of 19 *Del.C.* § 2363(e) and 21 *Del.C.* § 2118(g), and therefore, does not state a valid claim for relief.[3]

4. On February 9, 2023, AmGuard filed an Answering Brief asserting its right to seek reimbursement from the PIP carrier.[4] On February 28, 2023, Donegal filed its Reply Brief contesting AmGuard's position and providing further justification for dismissal.[5]

PARTIES' CONTENTIONS

5. Donegal argues that AmGuard's claim is in direct contravention to the statutory language of 19 *Del.C.* § 2363(e) ("§2363(e)"), which specifies that a workers' compensation carrier may only seek reimbursement from the third-party liability insurer, not the no-fault PIP insurer. Donegal contends that AmGuard, in its assertion that a worker's compensation carrier can seek reimbursement from a PIP carrier for payments made under the worker's compensation policy, misconstrues the

[2] *See*, Pl.'s Compl. (Trans. ID. 67962769) ("Compl.").
[3] Def.'s Mot. at 1.
[4] Pl.'s Resp. (Trans. ID. 69113013) ("Pl.'s Resp.").
[5] Def.'s Reply (Trans. ID. 69230333) ("Def.'s Reply").

amendments made to §2363(e) in 1993 and contradicts the Court's well-established precedent.

6. In support of its asserted statutory interpretation of §2363(e), Donegal further points out that 21 *Del.C.* § 2118 (g)(1) ("§2118(g)(1)") authorizes the no-fault PIP insurer to seek indemnification from any worker's compensation insurer obligated to make payments to the injured party.[6] Hence, Donegal argues that allowing AmGuard, as a worker's compensation carrier, to pursue subrogation against it, as the PIP insurer, would lead to an absurd result, where Donegal could simply turn around and counterclaim against AmGuard for indemnification under §2118(g)(1).[7]

7. Donegal also posits that AmGuard, in an attempt to support its position, conflates the issue of primary and ultimate payer. Despite no-fault benefits being referred to as "primary" in terms of first in sequence, Donegal contends that

[6] Section 2118(g)(1) provides that an "[i]nsurer providing [no fault benefits] shall be subrogated to the rights, including claims under any worker's compensation law, of the person for whom benefits are provided..."; *see also, Pennsylvania Manufacturers Association Co. v. Oliphant*, 1986 Del. Super. Lexis 1527 (Del. Super. Sept. 10, 1986) ("[i]t remains, however, that the worker's compensation insurer ultimately reimburses the PIP carrier for payment of those benefits which are required to be paid under the [worker's] compensation statute").

[7] Def.'s Reply at 4.

Delaware case law makes clear that the worker's compensation carrier is the ultimate payer, when worker's compensation and PIP benefits overlap.[8]

8. In response, AmGuard asserts that its right to subrogation is supported by the 1993 amendments to §2363(e) and Delaware case law.[9] AmGuard contends that the 1993 amendments were crafted to maximize a Plaintiff's recovery by allowing the worker's compensation carrier to look to the PIP carrier, as opposed to the Plaintiff's recovery, for reimbursement. AmGuard also argues that the issue of primary and ultimate payer is irrelevant because AmGuard maintains a right to reimbursement from the PIP carrier.[10]

STANDARD OF REVIEW

9. When deciding a motion to dismiss a complaint for failure to state a claim, made pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded allegations must be accepted as true.[11] Dismissal of a complaint under Rule 12(b)(6) must be denied if the plaintiff could recover under "any reasonably conceivable set of circumstances susceptible of proof under the complaint."[12] A claim may be

[8] Def.'s Reply at 6; *see also*, *Johnson v. Fireman's Fund Ins. Co.*, 1983 Del. LEXIS 762 (Del. Super., Nov. 21, 1983)(illustrating a no-fault carrier's right to indemnification from the workers' compensation carrier).
[9] Pl.'s Resp. at 6-9.
[10] *Id.*
[11] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[12] *Spence*, 396 A.2d at 968 (*citing* Klein v. Sunbeam Corp., 94 A.2d 385, 391 (Del. 1952)).

dismissed if "allegations in the complaint… effectively negate the claim as a matter of law."[13] "In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions".[14] Dismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.[15]

ANALYSIS

10. Section 2363(e) expressly states that a worker's compensation carrier seeking subrogation may only obtain reimbursement from the third-party liability insurer. By implication, this means that reimbursement shall not be sought against the no-fault insurer.[16] AmGuard appears to erroneously read "third-party liability insurer" and "no-fault insurer" to be one and the same. This Court's decision in *Titus v. Nova. Cas. Co.*, refutes such an interpretation.[17] In *Titus*, the Court was faced with the issue of whether a worker's compensation carrier that paid out proceeds to its injured employee could thereafter seek reimbursement from the UM/UIM carrier. The Court construed the language in §2363(e) and found that the phrase "third party liability insurer" as used in §2363(e) was clear and unambiguous and did not refer

[13] *VLIW Technology, LLC v. Hewlitt-Packard Co.*, 840 A.2d 606, 614-615 (Del. 2003).
[14] *Id.* at 615.
[15] *Id.* (emphasis in original).
[16] 19 *Del.C.* § 2636(e) ("*reimbursement shall be had only from the third party liability insurer*") (emphasis in original).
[17] 2012 WL 6755476 (Del. Super. Oct. 26, 2012).

to a UM/UIM carrier.[18] The Court granted summary judgment against the worker's compensation carrier and held that it could only seek reimbursement against the third-party liability insurer, which was the insurance carrier of the tortfeasor.[19] Applying the well-reasoned statutory construction in *Titus*, this Court concludes that AmGuard's position is at odds with the express language of §2363(e) which limits AmGuard's right to reimbursement to an action against the tortfeasor's liability insurer.

11. Moreover, a related statutory provision refutes the notion that reimbursement can be sought by the worker's compensation carrier against the PIP no-fault carrier. Title 21 *Del.C.* § 2118 makes clear that it is the PIP insurer that is entitled to indemnification from the worker's compensation insurer as opposed to the other way around.[20] Hence, the Court agrees with Donegal, that construing §2363(e) to "allow[] AmGuard to pursue subrogation would lead to an absurd result where Donegal [c]ould then [simultaneously] counterclaim for indemnification under §2118(g)(1)."[21] Such an absurd result could not have been the intent of the legislature when considering these two statutory provisions juxtaposed to each other.

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[18] *Id.*
[19] *Id.*
[20] *See* 21 *Del.C.* § 2118 (g)(1) ("Insurer providing [no fault] benefits shall be indemnified by any workers' compensation insurer obligated to make such payments to the injured party").
[21] Def.'s Mot. at 8.

12. Finally, this Court's holdings are resolute in finding a reimbursement obligation by the worker's compensation carrier to the no-fault carrier when benefits from both carriers have been paid out to the insured. For example, in *Pennsylvania Manufacturers Association Co. v. Oliphant*,[22] the Court found that in this overlap situation, both no-fault and worker's compensation insurers are liable to the injured worker.[23] Notably, however, the Court stated that "the worker's compensation insurer ultimately reimburses the PIP carrier for payment of those benefits which are required to be paid under the [worker's] compensation statute."[24] In that case, the Court specifically held that the PIP insurer is entitled to assert a reimbursement claim against the worker's compensation insurer.[25]

13. Similarly, in *Cicchini v. State*,[26] this Court again analyzed the interplay between no-fault benefits and worker's compensation benefits, and reiterated that the no-fault carrier has the right to subrogation against the worker's compensation carrier.[27] The Court in *Cicchini* outlined the no fault insurer's subrogation rights under the express language of §2118(g)(1) as follows:

> [H]ad the claims been processed under the PIP policy, as Plaintiffs advocate, the PIP carrier would be able to recoup all monies paid to the Plaintiffs by exercising its

[22] 1986 Del. Super. Lexis 1527 (Del. Super. Sept. 10, 1986) ("*Oliphant*").
[23] *Oliphant* at *5.
[24] *Id.*
[25] *Id.* at 8.
[26] 640 A.2d 650 (Del. Super. Jul. 12, 1993) ("*Cicchini*").
[27] *Cicchini* at 653.

> subrogation rights against the tortfeasor to the extent available after paying any claims by the Plaintiffs. If the tortfeasor had no insurance, or if it had been exhausted, the PIP carrier could seek indemnification from the workmen's compensation carrier.[28]

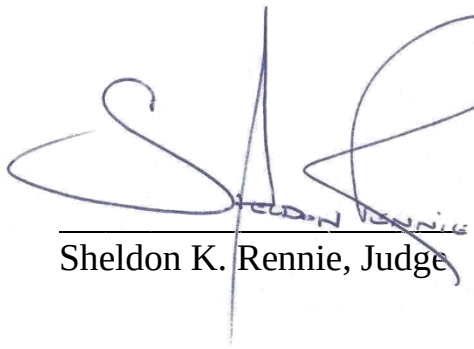
14. Having carefully reviewed the statutes and various Delaware cases that have interpreted them, the Court concludes that AmGuard's claim directly contradicts the clear language of 19 *Del.C.* § 2363(e) and 21 *Del.C.* § 2118(g) and cannot be sustained as a viable cause of action.

[28] *Id.*; *see also, Lane v. Home Ins. Co.*, 1988 WL 40013, *4 (Del. Super. Apr. 14, 1988) ("The Delaware no-fault statute establishes the priorities for recovery of benefits and the right of the PIP insurer for reimbursement against the workmen's compensation carrier"); *but see, Accident Fund Ins. Co. of Am. v. Zurich Am. Ins. Co.*, 2013 WL 6039914, *1 (Del. Super. Oct. 31, 2013) (considering the interplay between the no-fault and worker's compensation laws and holding that the worker's compensation insurer was entitled to reimbursement from the proceeds received by the employee for uninsured motorist benefits from the no-fault policy). Notwithstanding *Accident Fund Ins. Co of Am.*, the Court here finds that the circumstances of this case fall in line with the majority of cases which rule that a worker's compensation carrier's only right to reimbursement is the third-party liability insurer and not the PIP insurer.

CONCLUSION

Based on the foregoing, the Court finds that the Plaintiff, AmGuard, cannot recover under any reasonably conceivable set of circumstances susceptible of proof. Therefore, Defendant Donegal's Motion to Dismiss is hereby **GRANTED.**

IT IS SO ORDERED.



Sheldon K. Rennie, Judge

Original to Prothonotary

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